STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| BOENING BROS., INC. | : | DETERMINATION<br>DTA NO. 810740 |
| for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ending March 31, 1983 and March 31, 1986. | : | |

Petitioner, Boening Bros., Inc., 1098 Route 109, North Lindenhurst, New York 11757, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ending March 31, 1983 and March 31, 1986.

On February 27, 1993 and March 1, 1993, respectively, petitioner by its representative, Jack Mitnick, CPA, and the Division of Taxation by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel) waived a hearing and agreed to submit this case for determination. All documents and briefs were submitted by the parties by June 7, 1993. The Division of Taxation submitted its documents, which included a stipulation dated March 2, 1993, on March 9, 1993. Petitioner submitted its brief on April 5, 1993, and the Division of Taxation's answering brief was filed on May 6, 1993. Petitioner's reply brief was received on June 7, 1993. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether bottle deposits should be treated as income.

II. Whether, if bottle deposits are properly treated as income, the entire amount shown on petitioner's books at the end of the fiscal yearending March 31, 1986 should be included as income for such year rather than only the increased amount reflected on petitioner's books, i.e., the difference between the container deposits payable at the end of the fiscal year ending March

31, 1985 and the container deposits payable at the end of the fiscal year ending March 31, 1986.

FINDINGS OF FACT

Petitioner, Boening Bros., Inc. ("Boening"), as a beverage distributor operating in the Metropolitan Commuter Transportation District during the years at issue, charged its customers for container deposits pursuant to the "New York State Returnable Container Act" (L 1982, ch 200), as codified at Article 27, Title 10, "Litter and Solid Waste Control", of the Environmental Conservation Law ("ECL"). Pursuant to ECL 27-1005, included in petitioner's receipts from the sale of beverages were "refund values", commonly referred to as "bottle deposits". Pursuant to ECL 27-1007, when an empty beverage container of the type sold by Boening was returned to it, Boening paid the refund value (deposit) to the "dealer or operator of a redemption center".[1]

Petitioner accounted for its receipt of "bottle deposits" on its books as "unredeemed container deposits payable",[2] which increased as follows:

| Fiscal Year Ending | Unredeemed Container Deposits Payable | Increase from Prior Year |
|---|---|---|
| March 31, 1984 | $1,053,652.00 | -------- |
| March 31, 1985 | 1,536,395.00 | $482,743.00 |
| March 31, 1986 | 1,650,832.00 | 114,437.00 |

Petitioner reported entire net income (loss) of ($211,259.00) on its corporation franchise tax returns for the fiscal year ending March 31, 1986. It paid CT-3 (corporation franchise) taxes

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[1]The parties in their stipulation dated March 2, 1993 used the term "redeemer" as the party to whom Boening paid the refund value. However, ECL 27-1003.8 defines the term "redeemer" to mean "every person who demands the refund value provided for herein in exchange for the empty beverage container, but shall not include a dealer as defined in subdivision four of this section." "Dealer" is defined as "every person, firm or corporation who engages in the sale of beverages in beverage containers to a consumer for off premises consumption in this state." It would appear that Boening as a "distributor", which is defined at ECL 27-1003.6 as "any person, firm or corporation which bottles, cans or otherwise fills or packages beverage containers, or which engages in the sale of such containers to a dealer", paid the "refund value" to the "dealer or operator of a redemption center", who earlier had paid the "refund value" to a "redeemer".

[2]This apparently was the terminology used by petitioner on its books to account for bottle deposits received upon the sale of beverage containers to dealers.

of $14,473.00 and CT-3M (Metropolitan Transportation Business Tax Surcharge) taxes of $2,460.00.

The Division of Taxation ("Division") audited petitioner's corporation franchise tax reports for the fiscal years ending March 31, 1983, March 31, 1986 and March 31, 1987.[3] On audit, the Division treated the "unredeemed container deposits payable" as income. A Statement of Franchise Tax Audit Changes dated January 30, 1989 showed the following computation of tax due for the two years at issue herein:

| | Fiscal Year Ended March 31, 1983 | Fiscal Year Ended March 31, 1986 |
|---|---|---|
| Income reportable from container deposits | ___[4] | $1,650,832.00 |
| Truck & Auto | | 400,979.00 |
| Travel & Entertainment | | 60,064.00 |
| Salesman & Auto | | 83,560.00 |
| Net operating loss carryback disallowed | $211,259.00 | |
| Net adjustment | $211,259.00 | $2,195,435.00 |
| Taxable income previously stated | 0.00 | (211,259.00) |
| Corrected taxable income | $211,259.00 | 1,984,176.00 |
| Tax due | 21,125.90 | 198,417.60 |
| Add: Metropolitan Trans. Business Tax Surcharge | 3,591.40 | 33,730.99 |
| Corrected tax due | $ 24,717.30 | $ 232,148.59 |
| Tax previously computed | 0.00 | 16,933.00 |
| Additional tax due | $ 24,717.30 | $ 215,215.59 |
| 1085(B) penalty | --- | $ 10,760.78 |

Because the net operating loss for the fiscal year ended March 31, 1986 was eliminated, the net operating loss carryback to the fiscal year ended March 31, 1983 was eliminated.

[3]The results of the audit of March 31, 1987 are not at issue herein.

[4]The law requiring bottle deposits (L 1982, ch 200) became effective July 1, 1983 which would explain the lack of an entry for "income reportable from container deposits" for the fiscal year ended March 31, 1983. The record does not disclose if the fiscal years ended March 31, 1984 and March 31, 1985 were audited.

Four notices of deficiency, all dated June 14, 1989, correspond, for the most part,[5] to the Statement of Franchise Tax Audit Changes.

They asserted tax due of $21,125.90 plus interest for the year ended March 31, 1983, tax due of $3,591.40 plus penalty for the year ended March 31, 1983 (representing the Metropolitan Transportation Business Tax Surcharge), tax due of $183,944.60 plus penalty and interest for the year ended March 31, 1986, and tax due of $31,270.99 plus penalty and interest for the year ended March 31, 1986 (representing the Metropolitan Transportation Business Tax Surcharge), respectively.

A conciliation order dated February 14, 1992 resulted in the reduction of tax asserted as due for the fiscal year ending March 31, 1986 as follows:

(1) CT-3 tax asserted as due reduced from $183,944.60 plus penalty and interest to $130,743.20 plus penalty and interest.

(2) CT-3M tax asserted as due reduced from $31,270.99 plus penalty and interest to $22,226.75 plus penalty and interest. According to the parties' stipulation dated March 2, 1993, these reductions were based upon "reasons unrelated to the controversy at bar". The stipulation also noted that the notices of deficiency issued for the fiscal year ended March 31, 1987 were cancelled by the conciliation order also "[f]or reasons unrelated to the issues at bar". In sum, the parties noted that the conciliation order "reflects a total deficiency of $177,687.25 of which $152,969.95 [$130,743.20 plus $22,226.75] is attributable to the FYE March 31, 1986 and $24,717.30 is attributable to the FYE March 31, 1983."

The record does not disclose petitioner's actual treatment of the bottle deposits, i.e., whether they were physically segregated in any way from its general funds or were, instead, commingled with other receipts. It also does not explicitly disclose whether petitioner's "unredeemed container deposits payable" account, as noted in Finding of Fact "2", represents a net amount after the deduction for container deposits which have been paid to dealers or operators who have returned empty containers to petitioner, as a distributor, for redemption of

[5]The Notice of Deficiency for the period ending March 31, 1983 asserting the Metropolitan Transportation Business Tax Surcharge of $3,591.40 also showed penalty of $2,911.87 while the Statement of Franchise Tax Audit Changes did not show penalty added to the surcharge. However, it is observed that no interest was asserted in the Notice of Deficiency for the earlier fiscal year. Perhaps the penalty of $2,911.87 was, in fact, interest calculated due.

the "refund values". Furthermore, it is not known whether handling fees of 1.5 cents per container required under ECL 27-1007(3) to be paid to a dealer or operator of a redemption center who returns empty containers to petitioner, as a distributor, have been netted out against this "unredeemed container deposits payable" account.

Relevant portions of the stipulation dated March 2, 1993 have been incorporated into these Findings of Fact.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that Commr. v. Indianapolis Power and Light Co. (493 US 203, 110 S Ct 589, 107 L Ed 2d 591) "effectively overruled" the series of court decisions which treated container deposits as income in the year of receipt. Therefore, petitioner's treatment of bottle deposits as a liability rather than as income was proper. In the alternative, petitioner argues that only the difference between the container deposits payable at the end of the fiscal year ending March 31, 1985 and the container deposits payable at the end of the fiscal year ending March 31, 1986 should be included in its entire net income for the fiscal year ending March 31, 1986.

The Division counters that the United States Supreme Court's decision in Commr. v. Indianapolis Power and Light Co. (supra) is not applicable to the matter at hand. Because petitioner "did not reserve title to the containers[,] the entire amount of the receipt representing the sale of the beverage container and its contents is includable in gross income." According to the Division, "two separate transactions are taking place" namely a sale of the beverage container by petitioner to the dealer, and then a resale to petitioner by the dealer when the beverage containers are presented for redemption. The Division also contends that under Tax Law § 208(9)(d) it properly treated "the entire amount as income in the year of the audit rather than the year of receipt." The Division argues as follows:

> "The income of $1,650,832.00 in bottle receipts was never reported as income by the petitioner. During the fiscal year March 31, 1986 the petitioner had unrestricted access to the receipts it had reported as container deposits payably [sic]. Without taking this income into account, the entire net income does not reflect the level of business the petitioner conducts in New York State."

CONCLUSIONS OF LAW

A. Every beverage container sold or offered for sale in New York has a "refund value" of not less than five cents (ECL 27-1005). The regulations promulgated to effectuate the so-called bottle deposit law (6 NYCRR 367.1 et seq.) refer to the statutory "refund value" as a "deposit" on a beverage container, which "must be charged on each sale of such filled beverage container" (6 NYCRR 367.3[e]). Whether petitioner's receipt of such deposits at the time of sale of the beverage containers was properly treated as income is the central issue in this matter.

B. It is observed that the law, ECL 27-1007, and regulations, 6 NYCRR 367.5, required petitioner, as a distributor, to:

> "accept from a dealer or operator of a redemption center any empty beverage containers of the design, shape, size, color, composition and brand sold by the distributor, and shall pay the dealer or operator of a redemption center the refund value of each such beverage container . . ." (ECL 27-1007[2]).

It is observed that the law at ECL 27-1007[3] also required petitioner, as a distributor, to "reimburse such dealer or operator 1.5 cents for each beverage container accepted by the distributor from such dealer or operator of a redemption center." This so-called "handling fee" "must be paid [to the dealer or redemption center by the distributor] in addition to the refund value of each such empty beverage container" (6 NYCRR 367.6[a]).

As noted in Finding of Fact "7", the record on submission does not disclose with certainty whether petitioner's "unredeemed container deposits payable" account represents a net amount after the deduction for container deposits and handling fees which have been paid to dealers or operators who have returned empty containers to petitioner. Nonetheless, the central issue is a legal one and may be resolved despite this lack of detail in the record.

C. Tax Law § 208 defines the term "entire net income", in relevant part, as:

> "total net income from all sources, which shall be presumably the same as the entire taxable income . . . (i) which the taxpayer is required to report to the United States treasury department . . . ."

In addition to this explicit reference to income reported to the United States Treasury Department, New York income tax law evinces a strong intent to conform to Federal authority wherever possible (Hunt v. State Tax Commn., 65 NY2d 13, 489 NYS2d 451).

D. It is noted that there has been extensive litigation in the United States Tax Court and the Federal district courts concerning the treatment of bottle deposits as income in the year of receipt. A review of the following cases shows that all have been decided against the taxpayer (Dana Distributors v. Commr., 56 TCM 569, affd 874 F2d 120 [New York State bottle bill]; Colonial Wholesale Beverage Corp. v. Commr., 55 TCM 1736, affd 878 F2d 23 [Massachusetts bottle bill]; Wilson v. Commr., 51 TCM 811 [Michigan bottle bill]; Fred Nesbitt Dist. Co. v. U.S., 604 F Supp 552 [Iowa bottle bill]. Similar legal conclusions were reached in each of these cases: (1) bottle deposits are includable in income in the year of receipt and (2) no deduction is allowable for deposits which the taxpayer expects to refund.

The decision of the United States Tax Court in Dana Distributors v. Commr. (supra), which analyzed New York's bottle deposit law, is persuasive:

> "The law governing the taxability of amounts collected on the sale of items returnable to the seller is well-established. 'Deposits' on containers are includable in income if the containers are sold along with their contents (Okonite Co. v. Commissioner, 4 T.C. 618, 628 [1945], affd 155 F.2d 248 (3d Cir. 1946), cert. denied 329 U.S. 764 (1946). The later return of the container for a 'refund' of the 'deposit' is considered a resale" (Dana Distributors v. Commr., supra).

In Dana Distributors, the Tax Court determined that the beverage distributor therein sold the containers along with their contents for three reasons:

> "First, the sales invoices contained no title retention clause. Second, petitioner did not place its name on the containers or exhibit any other effort to control disposition of the containers. Third, petitioner had no enforceable right to compel the retail stores, bars, restaurants, or individual consumers to return the containers. While there is an economic incentive to return the containers, under New York law the buyers are free to keep the containers, dispose of them or return them to other distributors besides petitioner" (Dana Distributors v. Commr., supra).

E. Boening has not established any facts to distinguish its situation from that of the taxpayer in Dana Distributors. Rather, it contends that the United States Supreme Court in Commr. v. Indianapolis Power and Light Co. (supra) effectively overruled Okonite Co. v. Commr. (supra), which was relied upon by the Tax Court in Dana Distributors v. Commr. (supra). In Commr. v. Indianapolis Power and Light Co. (supra), the United States Supreme Court decided that customers' deposits to ensure payment of future utility bills were not taxable income to the utility company upon receipt. Petitioner is correct that the analysis used by the

Court to determine whether the deposits were income to the utility company involved a determination whether the taxpayer had "complete dominion" over the deposits:

> "[A] customer submitting a deposit made no commitment to purchase a specified quantity of electricity, or indeed to purchase any electricity at all. [The utility company's] right to keep the money depends upon the customer's purchase of electricity and upon his later decision to have the deposit applied to future bills, not merely upon the utility's adherence to its contractual duties. Under these circumstances, [the utility company's] dominion over the fund is far less complete than is ordinarily the case in an advance-payment situation" (Commr. v. Indianapolis Power, supra, 107 L Ed 2d at, 600).

Petitioner also is correct that this "complete dominion" standard resulted in the United States Tax Court reconsidering an earlier decision which was adverse to the taxpayer. In Oak Industries v. Commr. (96 TC 559), the Tax Court determined that security deposits received by a subscription television operation to ensure the return of an electronic decoder box provided to its subscribers were not "includable in petitioner's taxable income because [the subscription television operation] did not enjoy 'complete dominion' over the deposits when the deposits were made." This holding represented a reversal of an earlier one in Oak Industries v. Commr. (52 TCM 1556), in which the Tax Court had applied a standard of "all facts and circumstances" to determine if the deposits were properly treated as income.

F. However, petitioner's argument that Commr. v. Indianapolis Power and Light Co. (supra) "effectively overruled" Dana Distributors v. Commr. (supra) and similar cases is rejected. The Division's argument that the matter at hand involves two transactions not one as in Commr. v. Indianapolis Power and Light Co. (supra) provides a ready way to distinguish the situation at hand. Unlike the situation in Oak Industries v. Commr. (supra), where the electronic decoder box was never sold to the subscriber, petitioner sold the beverage container along with the beverage. When the empty container was returned for its deposit, it was resold back to petitioner.

G. Boening's petition is granted to the extent that only the difference between the container deposits payable at the end of the fiscal year ending March 31, 1985 and the container deposits payable at the end of the fiscal year ending March 31, 1986 may be included in Boening's entire net income for the fiscal year ending March 31, 1986. Including the entire

amount shown on Boening's books for container deposits payable at the end of the fiscal year ending March 31, 1986 of $1,650,832.00, instead of the difference of $114,437.00, would not properly reflect Boening's entire net income for its fiscal year ending March 31, 1986. As noted in Finding of Fact "2", it appears that Boening received the major part of its bottle deposits (which it never paid back to dealers or operators of redemption centers) during the first year of the implementation of the bottle bill or during its fiscal year ending March 31, 1984. By the time the Division audited Boening, the statute of limitations apparently barred an assessment for this earlier year. The Division may not now utilize Tax Law § 208(9)(d) as a way around the statute of limitations since including the entire amount of $1,650,832.00 would not properly reflect Boening's entire net income for the fiscal year ending March 31, 1986. In short, income from bottle deposits is properly included in the year of receipt (cf., Schlude v. Commr., 372 US 128, 83 S Ct 601, 9 L Ed 2d 633). Furthermore, the three examples in the Division's regulations of situations where Tax Law § 208(9)(d) may be properly used to allocate income to a different period are quite different from the situation at hand (20 NYCRR 3-2.7; cf., Matter of Seidman-Soling Builders, State Tax Commn., March 9, 1984).

H. The petition of Boening Bros., Inc. is granted to the extent indicated in Conclusion of Law "G" but, in all other respects, is denied, and the four notices of deficiency, all dated June 14, 1989, are to be so modified to conform.

DATED: Troy, New York
November 10, 1993

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE